

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA FOR	)	
THE USE OF BRIGGS PLUMBING	)	
HEATING & ELECTRICAL, INC., )	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 97-94-B
	)	
AKINS ENGINEERING &	)	
CONSTRUCTION, INC.	)	
	)	
and	)	
	)	
NOBEL INSURANCE CO., )	)	
	)	
Defendants	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>**

The plaintiff, Briggs Plumbing, Heating & Electrical, Inc. (Briggs), having provided mechanical and plumbing work as a subcontractor to the defendant general contractor, Akins Engineering & Construction, Inc. (Akins), seeks to recover payment for the work from the bond that a federal statute, the Miller Act, 40 U.S.C. §§ 270a - 270b (1986 & Supp. 1997), requires certain government general contractors to provide. By its complaint, Briggs alleges breach of contract; unjust enrichment; a claim for payment by the surety pursuant to the payment bond; and a claim pursuant to the Prompt Payment Act, 31 U.S.C. §§ 3901-3907 (1983 & Supp. 1997). Akins brought counter-claims against Briggs for breach of contract and for abuse of process.

The Court conducted a trial on the matter from January 5, 1998, through January 7, 1998. Testimony was given by the plaintiff's owner, Gary L. Briggs, and by the defendant's owner, Watie

---

<sup>1</sup> Pursuant to 28 U.S.C. § 636(c) (1993), the parties have consented to proceed before the United States Magistrate Judge.

J. Akins, and by several other defense witnesses, including Peter W. Ogden; Glen A. Tompkins; Stephen L. Moody; Tami Somers; and Jane N. Akins. At trial, the Court granted Briggs's motion for a judgment as a matter of law on Akins's abuse of process claim. The Court has before it deposition transcripts by certain witnesses, as well as other exhibits stipulated to by the parties and admitted in evidence. The parties have filed post-trial proposed findings of fact and conclusions of law for the Court's consideration, as well. After considering the evidence and the arguments advanced by the parties, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

### ***I. Findings of Fact***

This case arises as a result of materials supplied and work performed at the Air National Guard facility in Bangor, Maine. Akins was chosen by the government to be the prime contractor for the construction of a vehicle parking shed (VPS) and a refueling vehicle maintenance facility (VMF). Pursuant to two contracts entered into by Akins and Briggs on October 16, 1995, Briggs agreed to provide certain mechanical and plumbing work for the projects. The agreed upon contract amount for the VPS was \$49,950.00, and was \$49,999.00 for the VMF. Briggs claims that, despite successfully completing work on the VPS, Akins has paid it only \$28,765.00, leaving a balance due of \$21,185.00. With respect to the VMF, Briggs claims that Akins paid it only \$35,220.00, leaving a balance due of \$14,779.00. Briggs thus claims a total balance due by Akins of \$36,328.09, plus interest. For its part, Akins claims that Briggs delayed the completion of both projects to its detriment, causing Akins more than \$150,000.00 in damages. Akins claims a setoff and/or

recoupment by way of liquidated damages as a result of Briggs's delay in completion of the contract.<sup>2</sup>

Akins has refused to pay Briggs any of the balance due on either of the two contracts, maintaining that Briggs should pay damages to it above and beyond the \$36,000.00 it withheld from Briggs.

After the execution of the two subcontracts, the government issued to Akins a notice to proceed on the prime contracts. Originally, the government allowed Akins 420 days to complete each of the contracts, which made the initial completion dates December 4, 1996. Although the subcontracts between Akins and Briggs contain no express completion dates, they do purport to incorporate the contracts between Akins and the government. Based on the evidence adduced at trial, I find that Akins did not ever provide Briggs with a copy of the relevant portions of the general contracts between Akins and the government that set forth the completion dates for the projects. I instead find that the first notice Briggs received of any completion dates was on December 13, 1996, and on January 24, 1997, when it received letters from Akins stating that these very same dates were the deadlines for completion of the VMF and the VPS. With the receipt of these letters, Briggs was informed that Akins would impose liquidated damages for delays in the amount of \$200.00 per day per project.

---

<sup>2</sup> As the First Circuit has instructed, a "setoff" is different from a "recoupment" under the law. While the former may take the form of a counter-claim arising out of a transaction *extrinsic of a plaintiff's cause of action*, a recoupment is a reduction or rebate by the defendant of part of the plaintiff's claim due to a right of the defendant's that *arises out of the same transaction*. *United Structures of America v. G.R.G. Engineering*, 9 F.3d 996, 998 (1st Cir. 1993) (citing Black's Law Dictionary 1147, 1230 (5th ed. 1979)). The Miller Act appears to contemplate a recoupment defense by the general contractor, providing that a claim brought by a subcontractor who is in privity with the general contractor "is subject to reduction" for "defective articles or work." *Id.* at 999 (citation omitted).

The evidence supports a finding that several delays unrelated to Briggs caused the projects to be completed later than initially contemplated. Early on in the progress, Akins experienced a delay of several months in obtaining approval from the government of the pre-fabricated metal buildings used at the sites. Thus, although Akins initially planned on beginning construction of the VMF in December of 1995, it did not begin erecting the building until mid-August of 1996, approximately eight months later. Likewise, as regards the VPS, Akins did not meet its original goal of beginning work there in December of 1995, but, rather, had to wait until September of 1996, approximately nine months subsequent. In letters written to the government in September 1996 and in February 1997, Akins attributed the delays in construction to delays in receiving approval of the metal buildings during the submittal process. In the February 1997 letter, Akins admitted that it "should have asked for an extension of contract time . . . ." The delays related to approval of the metal buildings affected the progress on both the VPS and the VMF. Other delays unrelated to Briggs contributed to the untimely completion of both projects, as well.

For example, with respect to the VPS, the metal building did not arrive on site until September 3, 1996. Akins began erecting the building one week later, on September 10, but mistakenly erected the building backwards. Akins was delayed approximately one week while it dismantled the building and re-erected it in the proper direction. High winds subsequently delayed installation of the roofing system. Completion of the building was delayed further due to a change in the sprinkler system. The government allowed Akins an extension to January 24, 1997, for modification of the sprinkler system, but Briggs did not complete the work until sometime in February, 1997. A modification related to the roofing system extended the contract deadline further to February 14, but the electrician responsible for the work apparently did not complete it until

February 21. As of February 24, 1997, other trades still were working on the building. I find that Briggs completed most of its work on the VPS by mid-February, and that its work on that site finally was completed by March 6, 1997. Briggs requisitioned Akins for the final contract balances on both projects on February 12, 1997. Briggs subsequently notified the government, the project architect, and the bonding company on March 20, 1997, of the outstanding balances. The outstanding balance on the VPS subcontract was \$21,185.00. The government accepted the building from Akins as being substantially complete on March 5, 1997, nineteen days after the official contract completion date. I find that the main reasons for the late completion of the VPS were the delays associated with: beginning erection of the building; erecting the building backwards; constructing a 400 square foot addition; extending the interior wall thickness; changing the sprinkler system; and changing the metal roof system. These delays were not due to Briggs, and the government did not assess Akins with any liquidated damages for these delays.

The building for the VMF was delivered to the site on July 28, 1996, and work on that site had begun by August 14, 1996. The boiler room's walls were finished by October 15, 1996, but high winds delayed completion of the roof until at least November 4, 1996. The concrete slab for the boiler was completed on November 5, 1996, and Briggs commenced work in the boiler room on November 18, 1996. A change in the roof from a high-rib screw-down metal one to a standing-seam metal roof extended the contract completion date three weeks to January 3, 1997. The government allowed Akins an extension of time to January 31, 1997, in exchange for cost-free work to be done by Akins. There subsequently were problems associated with the fall protection system in the building, which, as of February 12, 1997, had not been delivered to the site. There were several contract modifications to the VMF, all of which extended the completion date for the facility, and

only some of which involved Briggs's work. Briggs completed its work on this building in the middle of February 1997. It was not, however, the only trade working at the facility at this time. The government accepted the building as substantially complete on February 26, 1997, twenty-six days after the official contract completion date. On the VMF, the outstanding balance due Briggs was \$14,779.00. The major reasons for the delay in the completion of the VMF were related to the erection of the metal building, the change in the masonry wall, and the change in the metal roof system. Briggs was not responsible for this work. As with the VPS, the government did not assess Akins any liquidated damages.

Although Briggs may have contributed somewhat to some of the delays associated with the two buildings' completion, I find that most of the delays were due either to Akins or to other subcontractors. I also am persuaded by the evidence that Briggs's work, when delayed, often was delayed due to various impediments that were not its fault, and that were encountered by Briggs as it tried to complete its work. For example, when Briggs first attempted to install the boiler at the VMF, it was unable to proceed due to masonry staging that was in the way. Briggs also was forced to wait at that building for a hole to be made in the concrete masonry before it could install the fuel oil supply. At the VPS, Briggs was delayed from using a scissor lift for overhead work because Akins was using it for a pump house enclosure. Also unrelated to Briggs were delays Akins experienced in receiving approval for compressor equipment. Briggs also experienced delays in starting up the boilers because permanent power had not been established by the electrician to the boiler rooms until early January 1997. Finally, I am persuaded by Briggs's contention that, by its very nature, mechanical work often must be done at the end of construction projects, after other work is complete.

I do not find, as Akins contends in its counterclaim, that Akins was damaged in the amount of \$150,000.00 due to Briggs's delays. Akins's claim that it not only is entitled to recoup any amounts due Briggs under the two contracts, but that it is entitled to receive payment from Briggs above and beyond the amounts it withheld from it under the contracts, is unpersuasive, as well. I find, in short, that Akins failed at trial to adequately support any of its claims for damages. I do not agree with Akins's assertion that Briggs was responsible for six weeks of delays at both project sites. There is insufficient documentation, testimony, or other evidence specific to the claims for damages to support any award. Akins's claim for \$9,315.00 for supervision costs at the site; for insurance in the amount of \$1,500.00; for trailer and operating expenses of \$1,260.00; for heat, electricity and phone in the amount of \$1,500.00; for "extra business work" in the amount of \$2,500.00; for loss of job work at Brunswick in the amount of \$44,290.00; for lost work at the Air National Guard facility in Bangor; for damages associated with the VMF as set forth in Exhibit 64; for liquidated damages at both the VMF and the VPS; and all other claims for damages, are without sufficient basis to justify any award.

Briggs acknowledges, and the Court agrees, however, with the correctness of Akins's recoupments or charge-backs of \$65.46 for the VSR flow switch at the VMF, as well as a \$500.00 recoupment for Briggs's use of the scissor lift at the VPS. I further find that any award to Briggs must be reduced by \$4,876.85, representing the payment Akins made to the Internal Revenue Service pursuant to a levy imposed on Briggs.

## ***II. Conclusions of Law***

The Miller Act "provides a federal cause of action for persons supplying labor and materials upon a payment bond secured by the principal contractor of a federal government project." *United States for use of John D. Ashern Co. v. J.F. White Contracting Co.*, 649 F.2d 29, 31 (1st Cir. 1981). "The Miller Act requires general contractors working on federal government projects to furnish a payment bond 'for the protection of all persons supplying labor and material' to the project." *United Structures of America v. G.R.G. Engineering*, 9 F.3d 996, 997 (1st Cir. 1993) (quoting 40 U.S.C. § 270a(a)(2)). It must be remembered that the Miller Act is not designed to benefit the prime contractor but, instead, was enacted for the special protection of the subcontractor on government construction contracts. *U.S. for use of DDC Interiors, Inc. v. Dawson Const. Co., Inc.*, 895 F. Supp. 270 (D. Colo. 1995), *aff'd*, 82 F.3d 427 (10th Cir. 1996). In actions brought under the Miller Act, issues involving construction of the Act, such as ordinary contract issues, will be resolved by the laws of the state where the contract is performed. *United States for use of Endicott Enterprises, Inc. v. Star Brite Const. Co.*, 848 F. Supp. 1161 (D. Del. 1994).

The Prompt Payment Act requires that each "construction project awarded by an agency" include a clause that requires that "each subcontract for property or services entered into by the prime contractor and a subcontractor" include, *inter alia*:

(1) a payment clause which obligates the prime contractor to pay the subcontractor for satisfactory performance under its subcontract within 7 days out of such amounts as are paid to the prime contractor by the agency under such contract.

31 U.S.C. § 3905(b). Such a clause requiring the subcontract clause was part of Akins's contract with the United States.



I conclude that Briggs is entitled to prevail on its claims for breach of contract, violation of the Prompt Payment Act, and its claim for payment pursuant to the bond issued by Nobel Insurance Company.<sup>3</sup> This determination is based on evidence that Akins retained money due to Briggs without authority under the contract. Akins failed to make payments due Briggs within seven days receipt of the government payments in violation of the Prompt Payment Act. I further find that Briggs is a protected entity for purposes of any and all payment bonds issued by Nobel Insurance Company. Because I cannot conclude that Briggs is responsible for Akins's losses, I find against Akins on its breach of contract counter-claim, and accordingly deny Akins's request for damages.

Taking into consideration the \$4,876.85 Akins paid the IRS pursuant to the levy imposed on Briggs, as well as the \$500.00 charge-back for Briggs's use of the scissor lift, and the charge-back of \$65.46 for the VSR flow switch, I find that Akins owes Briggs \$30,885.78 (\$36,328.09 - \$5,442.31), plus interest.

### ***III. Conclusion***

Accordingly, I conclude that the general contractor, Akins, breached its contract with the subcontractor, Briggs, with regard to work performed during the construction project at the Air National Guard site. Accordingly, a judgment shall be entered in Briggs's favor, and payment is due Briggs pursuant to the bond issued by Nobel Insurance Company in the amount of \$30,885.78.

---

<sup>3</sup> Having found in Briggs's favor on the breach of contract claim, the Court does not reach the unjust enrichment claim.

***SO ORDERED.***

---

Eugene W. Beaulieu  
U.S. Magistrate Judge

Dated this \_\_\_\_ day of January, 1998.